

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

74-1258

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1258

NATURAL RESOURCES DEFENSE COUNCIL, INC.

Petitioner,

v

ENVIRONMENTAL PROTECTION AGENCY,

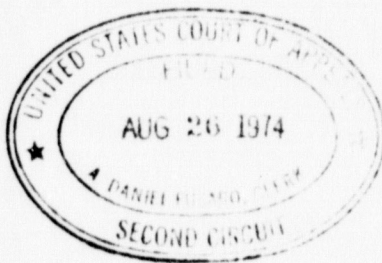
Respondent;

CELANESE CORPORATION, ET AL.,

Intervenors.

On Petition For Review Of Action Of The
Administrator Of The Environmental
Protection Agency

BRIEF AMICUS CURIAE
FOR THE
AMERICAN IRON AND STEEL INSTITUTE



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AS AMICUS CURIAE

August 23, 1974

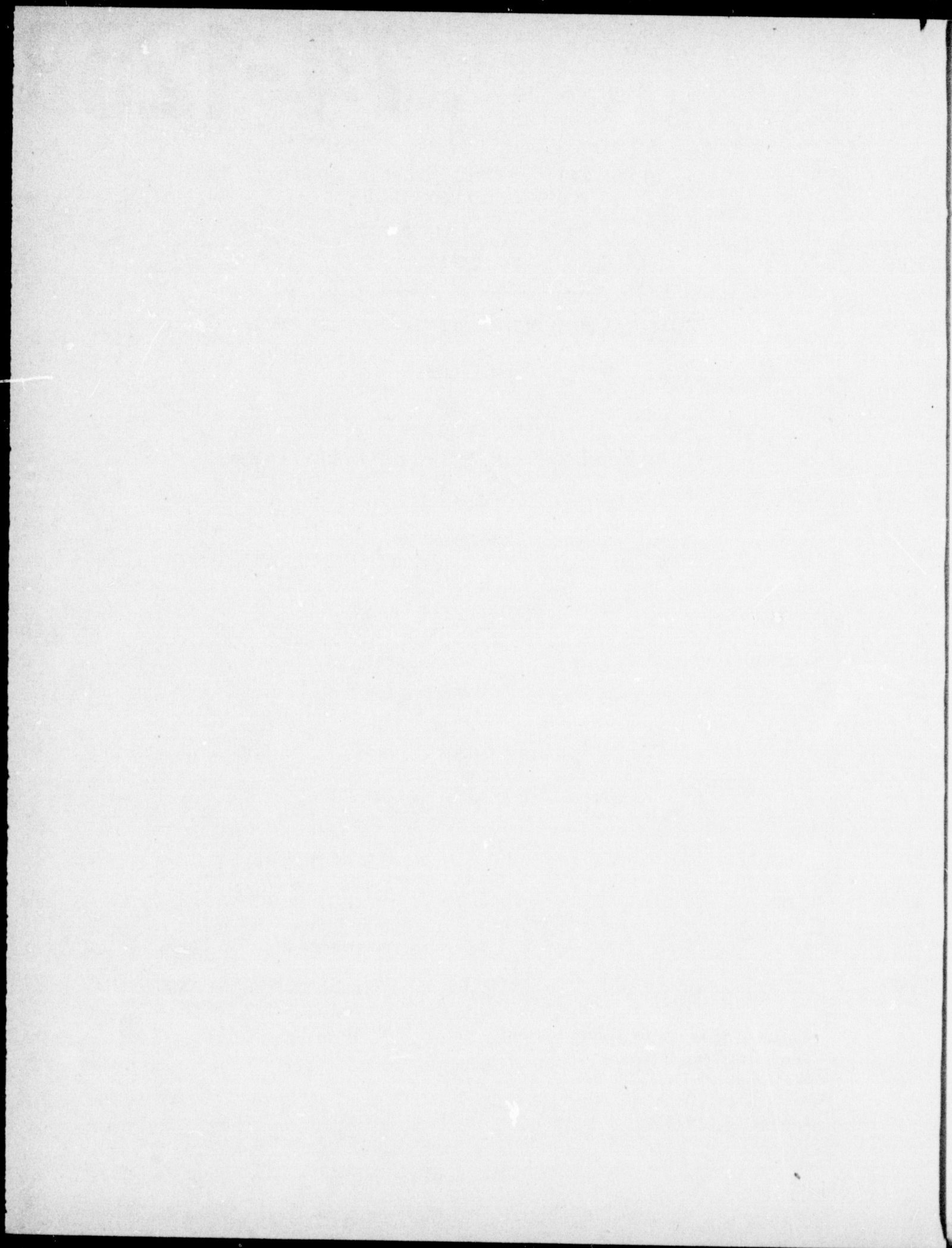


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BRIEF FOR AMERICAN IRON AND STEEL INSTITUTE

AS AMICUS CURIAE

Preliminary Statement

This is an action brought pursuant to §509(b) of the Federal Water¹
Pollution Control Act Amendments of 1972 (herein "the FWPCA" or "the Act")
in which Petitioner seeks review of identical portions (herein "the variance
provision") of the following Effluent Limitations Guidelines issued by the
Environmental Protection Agency (EPA) under the FWPCA:

1/33 U.S.C. §1251 et seq. References herein to the FWPCA will refer to
sections of the Act itself, rather than to its designation in the United States
Code. Both petitioner's and intervenor's briefs refer to the FWPCA, so refer-
ences herein to that act should help this Court compare amicus' position with
that taken by those parties.

- (a) Part 412, Feedlots Point Source Category,
39 Fed. Reg. 5703 (February 14, 1974);
- (b) Part 426, Glass Manufacturing Point Source
Category, 39 Fed. Reg. 5711 (February 14, 1974);
- (c) Part 422, Phosphate Manufacturing Point Source
Category, 39 Fed. Reg. 6579 (February 20, 1974);
- (d) Part 411, Cement Manufacturing Point Source
Category, 39 Fed. Reg. 6589 (February 20, 1974);
- (e) Part 428, Rubber Processing Point Source
Category, 39 Fed. ~~Reg.~~ 6660 (February 21, 1974);
- (f) Part 424, Ferroalloy Manufacturing Point Source
Category, 39 Fed. Reg. 6805 (February 22, 1974);
- (g) Part 427, Asbestos Manufacturing Point Source
Category, 39 Fed. Reg. 7525 (February 26, 1974);
- (h) Part 432, Meat Products Point Source Category,
39 Fed. Reg. 7893 (February 28, 1974);
- (i) Part 421, Nonferrous Metals Manufacturing Point
Source Category, 39 Fed. Reg. 12821 (April 18, 1974).

Amicus American Iron and Steel Institute [the Institute] is a trade association whose industry members comprise approximately 95 percent of all businesses engaged in producing or finishing steel. The variance provision disputed herein is identical to the variance provision contained in the Effluent Guidelines and Standards promulgated by the Environmental Protection Agency for the Iron and Steel Manufacturing Point Source Category on June 28, 1974 (39 Fed. Reg. 24114 et seq.). Amicus' members are subject to those guidelines and to language identical to that being reviewed in this proceeding. Thus, their interests will be affected by the outcome of this litigation. The motion for leave by the consent of all parties to file a Brief as an Amicus Curiae was filed on June 11, 1974.

Petitioner seeks review of identical variance provisions contained in related regulations of the Environmental Protection Agency "which provide that the Administrator of the Environmental Protection Agency has power to grant exceptions to the effluent limitation guidelines promulgated under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, et seq., on an individual plant by plant basis." (Amended Petition, at 1.) Amicus will show that resolution of the jurisdictional question argued by petitioners and intervenors does not answer the substantive questions

presented by this petition. Secondly, Amicus will show that if the court finds that the EPA has otherwise acted in compliance with §304 of the FWPCA, then the court must also uphold the disputed "variance provision."

Questions Presented

1. Does the resolution of the question of whether this Court has jurisdiction to review the contested guidelines answer the substantive questions raised by this petition?

2. If the EPA's regulations are otherwise in accord with the FWPCA, is the "variance provision" in contravention of EPA's statutory authority?

Summary of Argument

This Court's jurisdiction to review the Administrator's guidelines under §304(b) of the Act must be determined by interpreting the language of §509(b)(1)(E) of the FWPCA which provides for review in the Circuit Court of Appeals "of the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 301" This determination of jurisdiction over §304 guidelines is unrelated to the question of whether the Administrator is authorized to issue effluent limitations under §301. In fact, §301 does not authorize the Administrator to promulgate effluent

limitations, so that rationale cannot provide a basis for this Court to take jurisdiction to review the Administrator's guidelines promulgated under §304 of the Act.

EPA is under a clear statutory duty to apply its guidelines for "best practicable control technology currently available" (the 1977 standard) to individual point sources. The language of the Act expressly calls for individual point source application of the 1977 standard and the legislative history is in accord. The portion of the legislative history relied upon by the petitioner, National Resources Defense Council [NRDC], which appears to call for class-and-category treatment refers only to the 1983 (or "best available technology economically achievable") standard.

To provide the prescribed individualized application of the 1977 standard, the FWPCA requires EPA to promulgate detailed guidelines to instruct the permit grantor (the state, if it has an approved permit program) under §402 so that he can meaningfully apply the "best practicable control technology currently available" to formulate effluent limitations for point sources. Congress intended to delegate "the primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution . . . " to the states. (FWPCA §101(b)) Moreover, application by the states of uniform federal guidelines will provide

greater uniformity than will EPA's single rigid numbers combined with a variance provision which fails to provide standards for determining effluent limitations based upon the factors listed in §304. Section 301 clearly does not authorize the EPA to promulgate any regulations.

If the EPA's guidelines are found to be in accord with the requirements of §304, then the variance provision must also be upheld because it is an indispensable ingredient to the proper administration of the Act.

The FWPCA requires application of the 1977 standard to "point sources", not categories and classes. The "variance provision" is the sole means provided by EPA for complying with this mandate.

Recent case law has established the principle that an agency has the authority to grant variances to its regulations even if the controlling statute is silent on this point. Courts have held that variance provisions are essential to allow a reasonable and workable application of an otherwise rigid statutory scheme. Regulations may not be used as a shield against the duty to scrutinize individual cases in order to implement the purpose of the controlling statute.

Argument

- I. WHETHER OR NOT THIS COURT DECIDES THAT IT HAS JURISDICTION OVER THIS CASE, THIS COURT MUST HOLD THAT SECTION 301 OF THE FEDERAL WATER POLLUTION CONTROL ACT DOES NOT AUTHORIZE THE ADMINISTRATOR TO PROMULGATE EFFLUENT LIMITATIONS.

Amicus, the American Iron and Steel Institute, disputes petitioner's contention that the question of jurisdiction is answered by this court's interpretation as to whether or not the Administrator is empowered to promulgate regulations under §301 consisting of effluent limitations (Brief for Petitioner, pp. 18-19). As the Institute will explain below, §301 does not empower the Administrator to promulgate effluent limitations. However, this fact does not resolve this Court's dilemma as to whether or not it can take jurisdiction to review the Administrator's guidelines under §304(b) of the Act.

The Administrator has in fact promulgated "effluent limitation guidelines": this is demonstrated by an inspection of the designations chosen by the Administrator for his own regulations. The portions of those regulations which contain the variance provision all have the following heading:

Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.² [emphasis added]

²/See, for example, Appendix at A 21, A 22, A 26, A 27, A 28, A 29, A 30, A 87, A 88 and A 89.

It is evident that the Administrator has in fact promulgated "effluent limitations guidelines", not "effluent limitations". Therefore, the jurisdictional question presented is whether or not this Court has jurisdiction under §509 (b)(1)(E) of the Act to review the Administrator's action in promulgating those guidelines. §509(b)(1)(E) provides for review in the Court of Appeals of "the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 . . . "

Section 509(b)(1)(E) does not mention §304, so this Court must decide whether mention of §301 (which refers to §304) also confers jurisdiction over action taken under §304. Section 301(b)(1)(A) provides in part:

In order to carry out the objective of this Act there shall be achieved -- not later than July 1, 1977, effluent limitations for point sources other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to [the guidelines issued under] section 304(b) of this Act . . .

Section 509(b)(1)(E) clearly confers jurisdiction over the approval or promulgation of the actual effluent limitation which must be achieved by the 1977 deadline set forth in §301. It does not necessarily follow that §509 (b)(1)(E) also confers jurisdiction over the guidelines under §304 which define

"best practicable . . . " A comparison of the review provisions for actions taken under §306 suggests that §509(b)(1)(E) does not confer jurisdiction over the guidelines. There is a separate review provision for "the Administrator's action (A) in promulgating any standard of performance under section 306". §509(b)(1)(A). Yet any effluent limitation approved or promulgated under §306 is reviewable under §509(b)(1)(E), the controlling review provision in this proceeding. This distinction tends to prove that the language "effluent limitation or other limitation" which appears in §509(b)(1)(E) must be interpreted to include only the limitation itself, excluding the federal standard from whence it came. Under this view, it follows that since a guideline is not a "limitation", it is not reviewable under §509(b)(1)(E). It should be obvious that this line of argument bears no relationship to the issue of whether the Administrator is empowered to promulgate effluent limitations by regulation under §301.

The same conclusion can be drawn about the theories under which it could be asserted that this Court could take jurisdiction. The theories that §304 is "incorporated" by §302 or that the promulgated guidelines are (part of) the "Administrator's action" in approving or promulgating an effluent

limitation under §301 have been asserted as bases for the Court's jurisdiction under §509(b)(1)(E). These theories, too, are unrelated to the issue of whether §301 authorizes the Administrator to promulgate effluent limitations by regulation under §301.

Under none of the conflicting theories discussed above must the court decide whether §301 empowers the Administrator to promulgate regulations consisting of effluent limitations. Moreover, the Administrator has not, and could not, issue effluent limitations under §301, so that rubric cannot be used as a basis for this Court to assume jurisdiction over the Administrator's action. But Petitioner has asserted that this court has jurisdiction because the Administrator has promulgated effluent limitations under §301, so the Institute is constrained to show that §301 does not authorize the Administrator to promulgate regulations consisting of effluent limitations.

A. Section 301 Does Not Authorize EPA to "Promulgate" or "Approve" Regulations Containing Effluent Limitations.

1. A comparison of the language of §301 with that of other sections of the Act shows that if Congress had intended regulations to be promulgated under §301, it would have so provided.

Section 301 of the FWPCA does not authorize EPA to promulgate
3
any sort of effluent limitations. Rather, this section requires that certain

3/An "effluent limitation" is nothing more nor less than a specific numerical restriction on discharges into certain waters. As defined in §502(11):
(3/Cont'd. on Page 11.)

effluent limitations "be achieved" according to the timetable set forth. The operative language set forth below outlines the function of §301:

Section 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved --

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act or (ii) . . . which will require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

(B) for publicly owned treatment works in existence on July 1, 1977 . . . effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or

(C) not later than July 1, 1977, any more stringent limitation . . . established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

3/

"(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class . . . in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act . . . or (ii) shall require compliance with any applicable pretreatment requirements and any other requirements under section 307 of this Act; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act." [subsections (c) - (f) omitted] [emphasis added]

Subsection (a) makes unlawful any discharge which does not comply with subsection (b). Subsection (b) sets a 1977 deadline for achieving effluent limitations established pursuant to sections 304(b)(1) (direct dischargers), 307 (pretreatment), 304(d)(1) (publicly owned treatment works), and water quality standards established under state law or under section 302. It sets a 1983 deadline for achieving effluent limitations established pursuant to sections 304(b)(2) (direct dischargers), 307 (pretreatment), 201(g)(2)(A) (publicly owned treatment works). Thus, section 301 is a key section of the FWPCA in that it gives legal force and provides a timetable for compliance with the Act's comprehensive scheme for controlling discharges into the

nation's waters. It does not, however, authorize the Administrator to determine these various effluent limitations under section 301. The various effluent limitations referred to are established under other sections of the Act. To cite the most self-evident example, the 1977 deadline for achieving limitations "established pursuant to any state law or regulations . . . or any other Federal law or regulation . . . " ⁴ does not refer to effluent limitations established under §301. Similarly, the reference to "water quality standard[s]" in §301(b)(1)(C) refers to effluent limitations established under §302. In contrast to §301, §302 provides procedures for determining effluent limitations.

Section 301 also requires the achievement of effluent limitations "which shall require compliance with . . . any requirements under section 307". Those effluent limitations are promulgated under §307, which requires the Administrator to "publish proposed regulations establishing pretreatment standards" and "not later than ninety days after such publication and after opportunity for public hearing . . . promulgate such pretreatment standards." In summary, when §301 provides that effluent limitations "shall be achieved" it is referring to something different from the requirement that effluent limitations be "promulgated." The term "shall be achieved" is directed to a

⁴/§301(b)(1)(C).

level of technology to be attained, but the guidelines published under section 304 constitute the factors defining that technology.

Moreover, a comparison of §301 with numerous other sections of the Act demonstrates that when Congress wanted the Administrator to promulgate regulations or establish limitations, Congress made that requirement explicit. Sections 302(a), 303(b), 303(c), 304(a)(1), 304(a)(2), 304(b), 304(c), 304(d), 304(f), 304(g), 304(h), 306(b), 307(a)(1), 307(a)(2), 307(b), 307(c), 311(b)(2)(A), 311(b)(4), 311(j), 312(b)(1), 403(c), 405(b) explicitly require the Administrator to either establish limitations, promulgate regulations, or publish information. The absence of that language (or any similar language) in §301 inescapably leads to the conclusion that Congress did not intend the Administrator to promulgate anything under §301.

Nevertheless, petitioner has contended that §301 authorizes the Administrator to promulgate regulations setting effluent limitations. In support of this contention, petitioner has relied upon §301(e) of the Act:

"(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act. (§301(e))

William Ruckleshaus, then Administrator of the Environmental Protection Agency, explained §301(d) of H.R. 11896 (§301(e) of the Act),⁵ which was eventually adopted by the Conference Committee:

Section 301(d). Effluent limitations required by Section 301 would be established and applied to all point sources of discharges covered by the Act by means of the permits issued under Title IV.

We favor the approach whereby effluent limitations would be applied to dischargers through a permit mechanism. (House of Representatives No. 92-911, 92d Cong., 2d Sess. 157 (1972), letter to Rep. John Blatnik, Chairman of the Public Works Committee of the House of Representatives) [emphasis added]

Although petitioner would interpret §301(e) to authorize the establishment of effluent limitations under §301, the intent of this section was quite the opposite. The effluent limitations referred to in §301 are to be established "in accordance with the provisions of this Act" -- a reference to other provisions of this Act, not §301 itself.

2. Effluent limitations applying "best practical control technology currently available" (the 1977 standard) are to be issued as permit conditions to implement the definitions of §304 according to the schedule of §301.

The specific effluent limitations which will be issued in accordance with the Administrator's §304(b) guidelines are those applying "best practicable

⁵/S. Rep. No. 92-1236, 92d Cong., 2d Sess. 121 (1972),

control technology currently available" (the 1977 standard). That subsection requires the Administrator "For the purpose of adopting or revising effluent limitations . . . [to] . . . publish . . . regulations, providing guidelines for effluent limitations." Section 301 requires that "there shall be achieved not later than July 1, 1977, effluent limitations for point sources . . . which shall require the application of best practicable control technology currently available as defined by the Administrator pursuant to section 304(b)."

Thus, §304 provides guidelines for limitations and §301 requires those limitations to be achieved by July 1, 1977. Finally, §402 establishes the National Pollutant Discharge Elimination System (NPDES) through which the permit grantor applies those guidelines to establish effluent limitations as permit conditions for point sources. Section 402(b) provides, inter alia for the states (or the regional Administrator, if there is no state permit program):

(1) To issue permits which

(A) Apply, and insure compliance with, any applicable requirements of sections 301 . . .

Thus, the actual effluent limitation -- the numerical restriction on discharges -- is determined by the permit grantor under §402. In some

instances, it is likely that those effluent limitations will not be based on "best practicable control technology" at all, but instead upon a stricter effluent standard or more stringent water quality standards. §301(b)(1)(C). In fact, only under §402 is it possible to assess all applicable standards to determine which set of guidelines, regulations, or standards provides the basis for setting the strictest effluent limitation which must be set forth in the permit in order to "insure compliance with . . . [section] 301." This scheme for establishing effluent limitations as permit conditions under state permit programs implements the policy of Congress that the states play the primary role in pollution control. As expressly set forth in §101(b) of the FWPCA:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. [emphasis added]

On pages 22-23 of petitioner's brief, petitioner asserts that the term "effluent limitation" does not have the same meaning as the term "permit condition". Amicus agrees. An "effluent limitation" is merely one of many possible permit conditions, including requirements for monitoring, reporting, inspections and entry. §402(b)(1); §308.

Further evidence that "effluent limitations under §301" are not federal standards but permit conditions is contained in the legislative history under §509, relating to judicial review. The Conference reports' summary of the Senate bill clearly makes this distinction:

Section 509 . . . requires that any suit against a Federal standard be filed in the United States Court of Appeals in Washington, D.C. Suits for review of the Administrator's action in approving or promulgating any effluent limitation under section 301 or 302 or issuing or denying a permit under section 402 of this Act would have to be filed in the Court of Appeals for the appropriate circuit. (S. Rep. No. 92-1236, 92d Cong., 2d Sess. 147 (1972))

Although the venue provisions of the Senate Bill were altered, the distinction between "federal standards" and "effluent limitations under §301" remains logically structured within the Act.

The Senate Report summarizes the statutory scheme of the legislation in clear and convincing terms:

Subsection (b) of [section 304] requires the Administrator, within one year after enactment, to publish guidelines for effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under §402. (S. Rep. No. 92-414, 92d Cong., 1st Sess. 51 (1971))
[emphasis added]

This summary states three propositions: (1) Section 304(b) requires the Administrator to publish guidelines for effluent limitations; (2) those effluent limitations must "[reflect] the mandate of section 301"; (3) those effluent limitations will be imposed as permit conditions. There is no mention of promulgating effluent limitations under §301 because there is nothing within the provisions of the Act to warrant such action.

II. IF THIS COURT FINDS THAT EPA'S APPLICATION OF SECTION 304 IS PROPER, THEN THE VARIANCE PROVISION MUST ALSO BE UPHELD.

As the Institute will explain below, the FWPCA requires the permit grantor (the state, if it has an approved state program; if not, the regional Administrator) to apply the Administrator's §304(b) "best practicable" guidelines to fashion effluent limitations for individual dischargers. If the Administrator's guidelines are interpreted as rigid numerical restrictions, then the variance provision is essential to allow the permit grantor to apply the factors listed in §304(b). The Act requires the permit grantor to apply those factors to individual point sources.

A. "Best Practicable Control Technology Currently Available"
(The 1977 Standard) Must Be Applied to Point Sources On
An Individual Basis.

Section 304(b) of the Act authorizes the Administrator to publish regulations providing "guidelines for effluent limitations" as a two-step process. First, the Administrator must

identify, in terms of amounts of constituents . . .
the best practicable control technology currently
available for classes and categories of point
sources . . . (§304(b)(1)(A))

Thus, the first step is to identify technologies (and the associated effluent reductions) available to classes and categories of point sources. This will provide the basis for deriving a range of numerical values for effluent limitations for specific point sources within a particular category or class. ⁶

⁶/The legislative history of the FWPCA is clear on this point: Congress intended that the Administrator establish a range of values for "best practicable technology currently available" for a category or class. The Senate Report explains:

In effect, for an industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category.

(⁶/Cont'd. on Page 21.)

The second step requires the Administrator to provide guidance to the permit grantor so that effluent limitations can be established for a particular point source within the Administrator's range. Section 304(b)(1)(B) requires the Administrator to

specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. [emphasis added]

6/ The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category.
(S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971))

The summary of the Act prepared by Senator Muskie evidences the same intent.

The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category.
(118 Cong. Rec. S16873 (daily ed., October 4, 1972)
(summary of Act prepared by Senator Muskie).

Legislative history reveals that Congress intended the factors for "best practicable control technology currently available" to be applied on a plant-by-plant basis:

In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. (S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971) [emphasis added])

Senator Muskie later confirmed this statement on the Senate floor, in response to a question from Senator Mathias. The floor leader of the bill explained that individual treatment would be afforded by the states through the mechanism of the permit programs under §402:

Mr. Mathias. Does section 301(b)(2)(A) on page 76 contemplate that a State, or the Administrator if appropriate, might be able to set the 1981 effluent limitations almost on an individual point source by point source basis?

Mr. Muskie. Section 301(b)(2)(A) as well as section 301(b)(1) anticipate individual application of controls on point sources through the procedures under the permit program established under section 402. (117 Cong. Rec. 38855 (1971))

Plant-by-plant application of "best practicable control technology currently available" (the 1977 standard) is also clearly prescribed by the legislative history to section 301(b):

Unfortunately, as noted above, little has been done to identify for industry the exact meaning, on a plant-by-plant basis, of the equivalent of secondary treatment. Through the permit program established under section 402, with the help of those States which have effective programs, the Administrator and the States can and should, by mid-1973, be able to apply specific effluent limitations for each industrial source. (S. Rep. No. 92-414, 92d Cong., 1st. Sess. 49 (1971) [emphasis added])

The mandate for plant-by-plant application of "best practicable technology currently available" (the 1977 standard) stands in sharp contrast to the mandate of the Act with regard to "best available technology economically achievable" (the 1983 standard). For the 1983 standard, the language calls for application of "best available technology" to "categories and classes" (§301(b)(2)(A)) with the same consistency that the Act calls for plant-by-plant application of the 1977 standard.

This distinction is apparent in §301, which requires in subsection (b)(1)(A) that there shall be achieved "not later than July 1, 1977, effluent limitations for point sources." In contrast, referring to "best available technology economically achievable", subsection (b)(2)(A) requires that there shall be achieved "not later than July 1, 1983, effluent limitations for categories and classes of point sources". This distinction is carried through to §301(c), which is a variance provision for the 1983 standard only.⁷ It would be absurd to contend that Congress would provide the opportunity for individualized treatment for the 1983 standard yet not provide the same opportunity for the interim 1977 standard. The only reasonable explanation for this apparent discrepancy is that a variance provision for the 1977 standard was deemed unnecessary because that standard was to be applied on a plant-by-plant basis in the first instance.

7/Section 301(c) provides:

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

This distinction between the application of the 1977 standard and the 1983 standard explains a portion of the legislative history upon which
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petitioner bases its case. To put this passage of Senator Muskie's description of the conference agreement into context, it must be quoted at greater length than that inserted in petitioner's brief:

In determining the "best practicable technology" for a particular class or category of point sources, the Administrator is directed to consider the relationship between the total cost of the application of such technology and the effluent reduction benefits to be achieved from such application within that category or class.

In determining the "best available technology" for a particular category or class of point sources, the Administrator is directed to consider the cost of achieving effluent reduction. The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class. (118 Cong. Rec. S.16874 (daily ed. Oct. 4, 1972)) [emphasis added]

Only the final sentence from this excerpt of Senator Muskie's explanation of the conference agreement was quoted by petitioner. It becomes readily apparent,

8/"Petitioner attaches a great deal of importance to this passage." (Brief for Petitioner, Page 36)

when put in context, that this passage, which concludes the paragraph discussing "best available technology", is in fact applicable only to "best available technology" (the 1983 standard). The paragraph describing "best practicable technology" contains no comparable language.

This interpretation of Senator Muskie's remarks about the conference agreement is confirmed by the Conference report itself. That report explains that section 301(b)(1)(A) "requires effluent limitations based upon best practicable control technology for point sources" by July 1, 1977, whereas §301(b)(2)(A) requires "not later than July 1, 1983, effluent limitations for categories and classes of point sources". (S. Rep. No. 92-1236, 92d Cong., 2d Sess. 120-121 (1972))

In summary, the text of the FWPCA and the legislative history both show that "best practicable technology currently available" (the 1977 standard) must be applied to establish effluent limitations on a plant-by-plant basis.

B. Individual Application of Best Practicable Control Technology Currently Available (the 1977 Standard) Through Detailed §304 Guidelines For Effluent Limitations to Appear in NPDES Permits Is The Best Way to Implement the Intent of Congress.

Heretofore, the Institute has outlined the statutory scheme for establishing effluent limitations requiring application of "best practicable control technology currently available" (the 1977 standard).

Aside from the requirements of this Act, the scheme set forth herein is also, the best way to establish effluent limitations requiring the application of "best practicable control technology currently available" by July 1, 1977.⁶ The following benefits are attained by compliance with the statutory mandate:

⁶/As a preliminary matter, the odd structure of §304 bears explanation. Congress wanted "best practicable" and "best available" effluent limitations to be "technology based" (as opposed to being based on water quality standards) without specifying a particular technology. (See H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 107-108 (1972)). To accomplish this feat, the Administrator is to first determine what numerical limitations can be achieved by the application of various technologies (§304(b)(1)(A)) and then provide guidance to the permit grantor to determine which of these technologies should be applied to a particular discharge (§304(b)(1)(B)). Based on this information, the permit grantor can translate those technologies back into numerical effluent limitations based on the information provided by the Administrator under §304(b)(1)(A).

1. Uniformity.

The uniformity desired by Congress can be attained only by the establishment of effluent limitations tailored to individual dischargers. The Institute notes two distinct aspects to Congress' desire for "uniformity". First, the standards are to be "uniform" in the sense that geographical location or differences in the quality of the receiving water will not cause different dischargers to bear unequal burdens under their permits. This represents the choice of "technology" based standards over "water quality" based standards. Secondly, the standards are to be "uniform" in the sense that plants with similar characteristics will be treated similarly. Thus, uniform treatment will be afforded to all. These two concepts appear in the Conference Report on the FWPCA:

9/ "As the President stated in his 1970 Message on the Environment, " . . . strict standards and strict enforcement are nevertheless necessary -- not only to assure compliance, but also in fairness to those who have voluntarily assumed the often costly burden while their competitors have not. Good neighbors should not be placed at a competitive disadvantage because of their good neighborliness."

"To overcome these existing disparities, the Administration proposed that 'standards be amended to impose precise effluent requirements on all industrial sources.' The enrolled bill has done so." (118 Cong. Rec. S18454 (daily ed. Oct. 17, 1972) remarks of Sen. Muskie, quoting letter from EPA Administrator William Ruckelshaus)

Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations. (S. Rep. No. 92-1236, 92d Cong., 2d Sess. 126 (1972) [emphasis added])

NRDC stresses the need for uniform standards, contending that "variability within a category must be taken into account in the rulemaking and not the permit writing process." (Brief for Petitioner, p. 36) But petitioner confuses 'uniformity' with 'rigidity' when it calls for a regulatory framework which must result in identical effluent standards for dissimilar plants. Uniformity of treatment requires recognition of differences rather than disregard of them.

2. Public participation.

Section 402(b)(3) provides for a public hearing on all permit applications before they are granted or rejected. This hearing should provide a forum for factual presentations concerning the precise effluent limitations (within the range set forth in the guidelines) which should be applied to the applicant. But if the effluent limitations have already been established by

regulation by the Administrator, then that public hearing will be an empty gesture. This would contravene the intent of Congress, as expressed in the Senate Report in its discussion of the permit program under §402:

An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing by the Federal Government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it. (S. Rep. No. 92-414, 92d Cong., 1st Sess. 72 (1971) [emphasis added])

Petitioner has written at length of the opportunity for public participation in the setting of guidelines in Washington. However, the submission of written comments was made only by the relatively few persons equipped within the brief time allotted to comment on the voluminous compendium of facts gathered by a contractor. This comment on guidelines of general application cannot substitute for a local public hearing on specific effluent limitations for a specific discharger as required by §402(b)(3) of the Act. Thus, if the Administrator were to issue effluent limitations under §301, he would be denying the public and the permittee their statutory right to a hearing

on the factual bases for the selection of precise effluent limitations. The rationale used to derive effluent limitations from the controlling guidelines would be insulated from the hearing process, contrary to the intent of the Act.

The variance provision, as written, does not cure this defect because it requires an initial showing by the applicant that his "factors" are "fundamentally different" from those considered by the Administrator. This requirement violates §402(b)(3) of the Act, which provides for "an opportunity for public hearing before a ruling on each such application . . . " (§402(b)(3)) [emphasis added] In contravention of this section, the Administrator would allow a meaningful public hearing on the proposed effluent limitations only when the applicant can make the difficult factual showing which the variance provision requires.

3. Integrity of the decision-making process.

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Section 511(c) of the Act not only exempts the issuance of effluent limitations from the National Environmental Policy Act of 1969 [NEPA] (42

10/Section 511(c) provides:

"(c)(1) Except for the provision of Federal Financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source

(10/Cont'd. on Page 32.)

USC §4321 et seq.) but precludes the review of effluent limitations by any other federal agency under the authority of NEPA. Senator Muskie explained that the justification for this provision lies in the extensive balancing analysis inherent in the provisions of the FWPCA:

10/ as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and

"(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to --

"(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or

"(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act.

NEPA requires, in section 102(2)(B) . . . that agencies of the Federal government identify and develop methods and procedures "which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." The ground rules for this kind of finely-tuned, systematic balancing analysis are explicitly set out repeatedly in the FWPCA.

This Act specifically identifies factors to be considered by the Administrator in making this kind of balancing analysis and the Conferees concluded that the substantive purposes and procedures of the Act fully satisfy and go far beyond what is required by 102(2)(B) . . . (118 Cong. Rec. 16878 (daily ed., Oct. 4, 1972) [emphasis added]

This description aptly characterizes section 304(b)(1)(B) of the Act, which requires the Administrator to specify factors to be taken into account in setting effluent limitations for individual plants. Those factors include:

the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements, and such other factors as the Administrator deems appropriate.

Specification of the factors listed in this section, (1) would provide guidance to the permit grantor for carefully fashioned effluent limitations for point

sources; (2) would open to scrutiny the balancing analysis which carefully weighs environmental costs and benefits; (3) would make the methodology and basis for the EPA's decision amenable to review; and (4) would allow a reasoned application of the variance provision by the permit grantor or based upon discernable standards.

Instead, the Administrator has promulgated inflexible numerical restrictions on discharges and printed voluminous "development documents" to justify the numbers selected. Petitioner refers in its brief to the great value of these documents. But nowhere in the massive development document¹¹ which the Institute has read could it find any indication of how a permit grantor could make a reasoned application of the factors listed in §304(b). That document, which the Institute believes is typical of the other development documents in this regard, does not cure the defects inherent in the rigid, single-number effluent limitations which EPA has promulgated.

¹¹/Development Document for Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Steel Making Segment of the Iron and Steel Point Source Category; EPA 440/1-73/024 (February 1974).

Had the Administrator "specified factors to be taken into account in determining the control measures and practices to be applicable to point sources" as required by §304(b)(1)(B), he would have laid the foundation for a reasoned evaluation of effluent limitations to be applied to a specific point source. The permit grantor's decision could be based on the application of carefully defined standards. In this regard, the Institute heartily concurs with the admonition of Chief Judge David Bazelon, concurring in International Harvester Co. v. Ruckelshaus, 478 F 2d 615, 652 (D.C. Cir. 1973):

But in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.

4. Active participation by the states.

NRDC's great fear of meaningful state role in controlling water
12 pollution was not shared by Congress when it passed the FWPCA. In §101(b)

¹²/Petitioner's brief's concluding point reads: "By this argument intervenor exposes the fundamental practical flaw in their position. If their approach is adopted, it is likely that the responsibility of standard setting for existing discharges will ship [sic] inevitably from the Administrator to the states." (Brief for Petitioner, Pages 42-43).

Congress expressed its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . "

Petitioner fears that if the Act is followed by the Administrator then the power to set standards for effluent limitations would 'inevitably slip to the states'. This fear is totally unfounded. As noted above, Section 304 calls for the Administrator to promulgate detailed guidelines and specifically requires the Administrator to (1) assign effluent reduction numbers to various treatment technologies (§304(b)(1)(A)) and (2) specify factors for the permit grantor to apply in formulating precise effluent limitations for point sources. Clearly, it was the intent of Congress that the Administrator set uniform national guidelines usable for decision-making by the states.

Petitioner has simply failed to distinguish between the functions of setting standards (done by the Administrator) and applying them (done by the states). Petitioner wants the Administrator to do both. This proposed unauthorized usurpation of the state role provided by the Act would flout the policy of Congress:

The Committee considered extensively the proposition that all the permits issued by the States ought to be subject to review and possible veto by the Administrator. During the Committee's hearings, the Governors and other representatives of the States, almost unanimously, stressed the need to put the maximum responsibility for the permit program in the States. They deplored the duplication and second guessing that could go on if the Administrator could veto the State decisions. The Committee believes that the States ought to have the opportunity to assume the responsibilities that they have requested. If, however, a State fails to carry out its obligations and misuses the permit program, the Administrator is fully authorized under subsection (c)(3) of this section to withdraw his approval of a State program. (H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 127 (1972))

The House Committee on Public Works concluded:

A system of permits which requires duplicative effort or destroys the initiative of the States and local governments is wasteful and non-productive. (id, at 125)

The Congress provided ample protection against abuse of state authority. Section 402(c)(3) empowers the Administrator to withdraw his approval of a state program that is not being administered in accordance with §402. Moreover, §402(d)(2) empowers the Administrator to veto any permit which a state proposes to issue. Thus, if the Administrator were to promulgate "effluent limitations" instead of the "guidelines for effluent limitations" provided for by §304(b), his action would not only be unauthorized but unnecessary if its purpose were to protect against abuse of state authority.

C. If EPA's Action Complies With The Act, Then The Variance Provision Is Necessary To Afford The Individualized Limitations Which The Act Requires.

As the Institute has explained above, the FWPCA requires plant-by-plant application of 'best practicable control technology currently available' (the 1977 standard). Contrary to the mandate of the Act, NRDC contends that the Administrator has promulgated a single rigid, numerical effluent limitation to be applied mechanically to every plant within a category or class.

If petitioner's view is adopted, the variance provision is absolutely essential so that the individualized treatment required by the Act can be afforded to individual dischargers. The variance provision reads as follows:

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a

written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. (See, for example, 39 Fed. Reg. 7897, February 28, 1974)

The provision has two obvious flaws. First, the requirement for qualifying for a variance -- "fundamentally different factors" -- is not only vague but also requires the applicant to attempt to contrast his plant with other plants only summarily described in the development document for his classification. Then, if he succeeds in proving a "fundamental difference", he must show what effluent limitations should be applied to him. This task will be made more difficult by the failure of the Administrator to specify how the factors listed in §304(b) should be applied to a point source. More to the point, the Administrator's failure to comply with §304 will make the permit grantor rule upon a variance request without the help of a set of standards which explain how to evaluate the factors listed in §304(b).

However, the Institute believes that even the ad hoc variance procedure provided by the Administrator is better than no variance procedure at all. Some such procedure is absolutely essential if anything like the same flexibility built into the 1983 standard is to be available for the 1977 standard. As noted above, §301(c) of the Act provides a procedure for obtaining a variance from the 1983 standard. The variance may be granted

upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants. (§301(c))

It would be absurd to suggest that Congress would allow a variance from the 1983 standard if it was beyond the economic capability of the owner to meet that standard, yet permit that owner to go out of business because he could not meet the interim 1977 standard. Therefore, at the very least, the same standards for obtaining a variance should be applied to the 1977 standard so as not to nullify §301(c). As the Institute has pointed out, §301(c) applies only to the 1983 standard because Congress had already provided plant-by-plant treatment for the 1977 standard. However, in the context in which these regulations are put before the Court, the variance provision is essential to the promulgated regulations if those regulations themselves are not to be set aside.

D. Federal Agencies Have An Affirmative Duty To Provide
An Exemption Procedure From Rules of General Application.

The Act expressly provides that certain factors must be considered in the promulgation of guidelines under §304(b)(1)(B). NRDC does not deny this point. In addition, NRDC readily acknowledges that,

the dispute between all the parties is not over whether there are variations among industrial dischargers -- there clearly are. (Brief for Petitioner, P. 35)

In petitioner's words, "the dispute is over the proper regulatory framework for dealing with those variations". (Brief for Petitioner, P. 35). NRDC argues that the variability within a point source category must be taken into account in the rulemaking and not the permit writing process, (Brief for Petitioner, P. 36) and that if the effluent limitation guidelines are not finely enough drawn, EPA's only course is to reopen the rulemaking process. (Brief for Petitioner, P. 42). Thus, petitioner theorizes that the Environmental Protection Agency is precluded from including exemption or variance provisions in its own regulations. NRDC asserts that the EPA lacks authority to determine certain factual matters such as "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques" etc. on a case by case basis. (Brief for Petitioner,

pp. 41-42). NRDC's theory with respect to the variance procedure is clearly erroneous. As previously described, the Federal Water Pollution Control Act requires the permit grantor to review all the above factors in establishing effluent limitations for each plant. Even if EPA were not expressly authorized to grant variances, however, applicable judicial precedents require agencies to establish variance procedures or, at a minimum, to consider nonfrivolous applications for waiver from broadly drawn regulations.

The issues in this case are closely related to principles established by the Supreme Court in In Re Permian Basin Area Rate Cases, 390 U.S. 747 (1968) and United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 755 (1972). In these cases, the Supreme Court held that federal agencies have the authority to issue exemptions or variances even if the statutory authority of the agency is silent on the matter. In the Permian Basin decision, the Supreme Court carefully reviewed a regulation created by the Federal Power Commission partially exempting small gas producers from the purview of its regulations. Although the Court acknowledged that the substantive ratemaking provisions of the Federal Power Act do not provide for exemptions, the Court held that the exemption provision in the Commission's regulations was within its authority.

The rationale for permitting agencies to create exemptions or variances from their regulations was further developed in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 755 (1972). The Supreme Court, in reaffirming the duty of agencies to establish exemption procedures from their rules pointed out that,

[i]t is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. 406 U.S. at 755.

In Allegheny-Ludlum, the Court had dealt with a regulation of the Interstate Commerce Commission. The same principle has been applied to
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the regulations of the Federal Communications Commission, and in two
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important decisions to the Environmental Protection Agency.

In WAIT Radio v. Federal Communications Commission, 418 F. 2d 1153 (D.C. Cir., 1969), for example, the Court of Appeals for the District of Columbia Circuit held that the Federal Communications Commission must consider serious requests for waivers from its rules. The court pointed out that

¹³/See, WAIT Radio v. Federal Communications Commission, 418 F. 2d 1153 (D.C. Cir. 1969), United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

¹⁴/See, Portland Cement v. Ruckelshaus, 486 F. 2d 375 (D.C. Cir. 1973) and Essex Chemical Corp. v. Ruckelshaus, 486 F. 2d 427 (D.C. Cir. 1973).

careful review of waiver applications from an applicable rule are not only permissible but are "appropriate . . . in the discharge by an administrative agency of its assigned responsibilities". 418 F. 2d at 1157. The court concluded that

"[t]he agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety value procedure for consideration of an application for exemption based on special circumstances." 418 F. 2d at 1157.

The court added a warning that "legal difficulties" arise when regulations are used as a shield by an agency to fend off serious exemption applications. In other words, administrative agencies have a duty to consider exemption applications from their regulations.

The principles set forth in WAIT Radio were amplified recently in two important decisions of the United States Court of Appeals for the District of Columbia concerning the authority of the Environmental Protection Agency. Portland Cement v. Ruckelshaus, 486 F. 2d 375 (D.C. Cir., 1973); Essex Chemical Corp. v. Ruckelshaus, 486 F. 2d 427 (D.C. Cir., 1973).
Both cases dealt with section 111 of the Clean Air Act as amended¹⁵ which

¹⁵/42 U.S.C. §1857c-g (1970).

provides in part that the Administrator shall promulgate "standards of performance for new sources of air pollution for certain stationary categories. Petitioners in Portland Cement and Essex Chemical had attacked EPA's regulations, in part, on the ground that the standards of performance set forth in the regulations failed to provide lesser standards for difficulties in startup, shutdown or inescapable mechanical malfunctions. Concurrent with the promulgation of the new source regulations, the Environmental Protection Agency had proposed a separate regulation which permitted the Administrator leeway in dealing with certain emissions exceeding the standards set forth in EPA's standard of performance regulations although the statute in no way provides for variances based upon those considerations. The court in Portland Cement in remanding the "standards" characterized the proposed exemption regulation as follows:

The proposed [variance] regulation, if adopted, may have consequences which go beyond mere provision for malfunctions. In some sense it imparts a construction of "reasonableness" to the standards as a whole and adopts a more flexible system of regulation than can be had by a system devoid of "give" . . . [A] regulatory system which allows flexibility and a lessening of firm prescriptions in a proper case, can lend strength to the system as a whole. (486 F. 2d at 399)

In discussing the same exemption regulation, a second panel of the Circuit Court of Appeals for the District of Columbia in Essex Chemical held that "variant provisions appear necessary to preserve the reasonableness of the standards as a whole" In remanding the section 111 standard, the court noted "that the proposed regulation should play an integral role in any reconsideration". (486 F. 2d at 433). These decisions all hold that administrative agencies have a legal duty to consider waivers or exemptions from rules of general application, a point which NRDC wholly ignores in its brief and pleadings. Underlying the NRDC approach is the premise that all regulations must be inflexible. That premise flouts the principle (set forth above) that flexibility strengthens a regulatory system by imparting a construction of "reasonableness" to the adopted standards. The administrative process would suffer if agencies were denied the flexibility to grant variances based upon the very factors set forth in the authorizing statute, as set forth here in section 304(b)(1)(B) of the Federal Water Pollution Control Act. Even NRDC does not attack the authority of EPA to consider factors set forth in section 304(b). It has failed to demonstrate (or even argue) how the policy of the Federal Water Pollution Control Act would be controverted if EPA grants variances based upon factors expressly enumerated in that statute.

EPA's action is identical to the regulatory scheme approved by the Supreme Court in United States v. Allegheny-Ludlum Steel Corp. which requires provision for "exemption procedures" from agency rules. NRDC's suggestion that EPA is limited to drawing fine subcategories (Brief for Petitioner, P. 42) overlooks the flexibility contemplated by Congress when it passed the statute.

If the variance procedure is allowed to function, the full expertise of the agency will be fully developed in response to the objectives and purposes of the Act, and the intent of Congress. Of course, the courts will have jurisdiction to review the exemption procedure as it operates in practice. ¹⁶ If the variance procedure is upheld, it will provide flexibility and an important safety valve to the regulatory system.

E. Petitioner's Theory Of Variance-Free Regulations Is Unworkable and Leads to Absurd Results.

The preceding discussion has demonstrated that petitioner's theory that the Administrator lacks authority to grant variances is based on a concept

¹⁶/Sections 509(b)(1)(E) and 509(b)(1)(F).

which is contrary to two prior decisions of the Supreme Court. In addition, principles set forth in other precedents (supra, pp.42-7) would be violated if the administrative agency were denied the discretion to grant variances based upon sound factual distinctions within the scope of the agency's authority and expertise.

The greatest misconception underlying petitioner's theory, however, is that the Administrator can adequately and properly take into account all the factors such as the age and size of plants, manufacturing processes, etc., described in section 304(b)(1)(B) on a point source category or subcategory basis. The inherent nature of these factors -- such as "age of equipment" -- make it impossible for the Administrator to reach a meaningful single point source effluent limitation for a category, class, or sub-class within an industry for all plants.

Petitioner's theory does not take account of what actually happens in the environment or what factors contribute to a particular discharge. NRDC construes the Federal Water Pollution Control Act as if it were intended to treat every point source discharger or class of dischargers alike rather than being intended to deal with effluent dischargers as they operate in the real

world and realities of protecting the environment (Brief for Petitioner, pp. 26, 34-35). Taken literally, NRDC's theory means that the agency, once it has promulgated an effluent limitation or guidelines, is locked into a position which must be administered across a broad range of different plants without exception even though petitioner concedes that there are clear variations among industrial dischargers.

The purpose of the variance procedure is to assure that the regulatory system as a whole will be workable. If the guidelines are interpreted as rigid limitations and the variance provision were stricken, EPA would be locked into an inflexible and unworkable regulatory system.

Conclusion

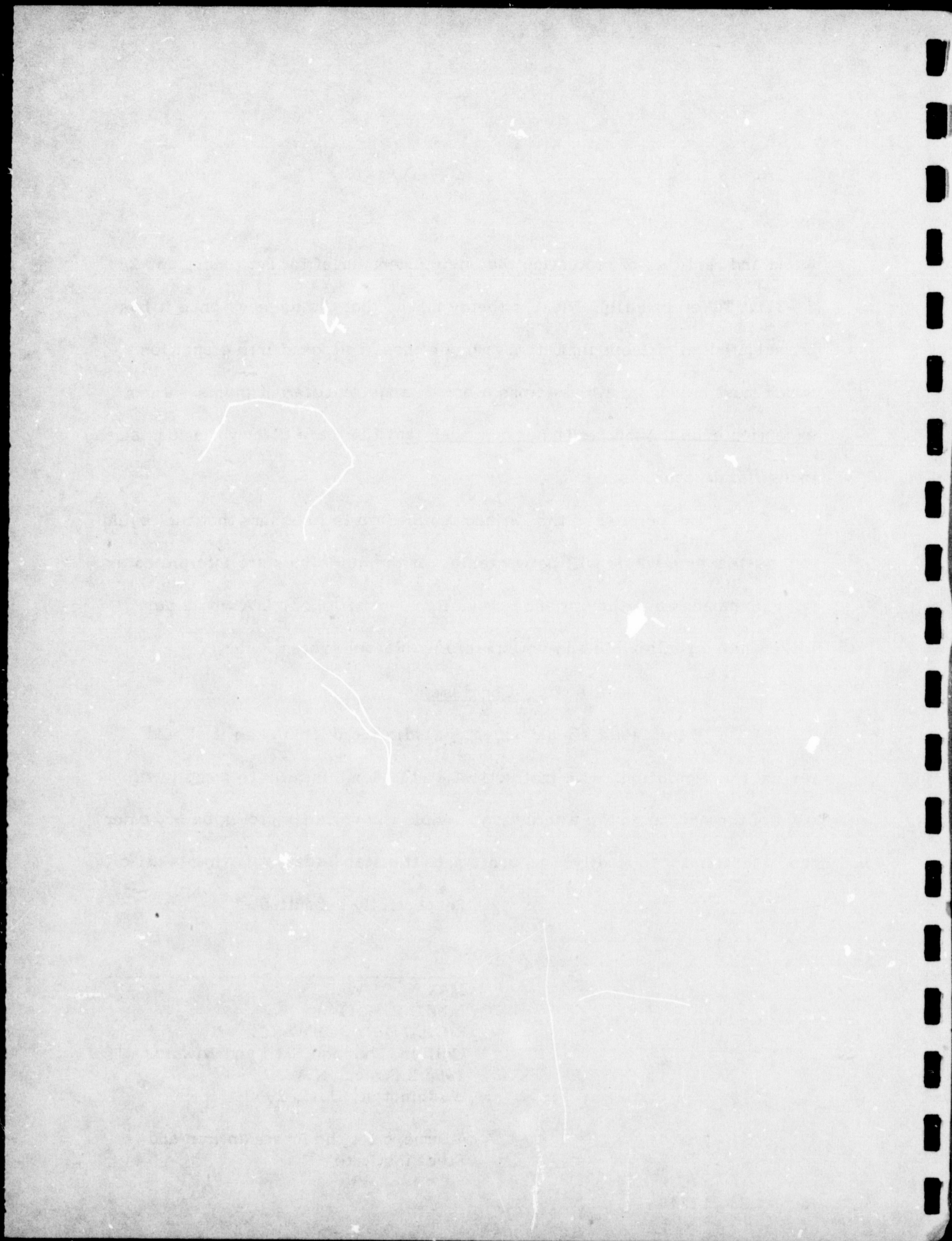
If this court should accept jurisdiction of this case it should remand the regulations with instructions to the Administrator to comply with §304 of the Act, or in the alternative, uphold the variance provision but order the Administrator to modify it to conform to the standards set forth in §301(c).

Respectfully submitted,

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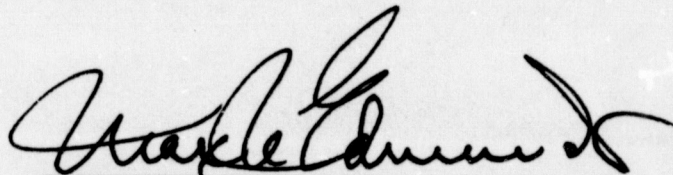
August 23, 1974



74-1258

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the Brief Amicus Curiae of the American Iron and Steel Institute upon Angus Macbeth, Esquire, Natural Resources Defense Council, Inc., 15 West 44th Street, New York, New York, 10036, attorney for petitioner, upon Raymond W. Mushal, Esquire, United States Department of Justice, Land and Natural Resources Division, Pollution Control Section, attorney for respondent and upon Robert C. Barnard, Esquire, Cleary, Gottlieb, Steen & Hamilton, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036, by first class mail, postage prepaid this 23d day of August, 1974.



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